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Dear Brian

Scottish Biometrics Commissioner Act 2020 – Draft Code of Practice

Thank you for your letter dated 1 October 2021, providing HMICS with the opportunity to participate in the formal consultation on the above Code of Practice, which relates to the acquisition, use, retention, and destruction of biometric data for criminal justice and police purposes in Scotland.

Having carefully considered the content of the draft, I can confirm that HMICS is supportive of the approach the Code of Practice describes.

We do have some additional comments/suggestions for your consideration prior to finalisation of the draft after the three-month consultation period.

Page 10, paragraph 6 – When describing the general function of the Commissioner, this should reflect the content of Section 2(3) of the Scottish Biometrics Commissioner Act 2020. Therefore, you might wish to add an additional bullet point: “promote, and monitor, the impact of the code of practice.”

Page 10, around paragraph 9/10 – You might wish to add a reference to the fundamental principle of policing by consent.

Page 12, paragraph 17 – An additional sentence could be added to make it clear that Section 56 also provides for the withdrawal of written consent.

Page 13, paragraph 23 – Do you want to clarify the position for the Civil Nuclear Constabulary?

Page 20, paragraph 50 – third bullet point – you might wish to insert the word ‘certain’ before the phrase ‘fixed penalty’ where it appears. This reflects the language used in Section 18D of the Criminal Procedure (Scotland) Act 1995.

Page 20, paragraph 50 – final bullet point – the wording in Section 18 of the Criminal Procedure (Scotland) Act is ‘as soon as possible’, not ‘immediately’.

Page 21, paragraph 51 – Removing the words ‘persons who have been arrested’ and replacing them with ‘persons where criminal proceedings were instituted’, reflects the language used in



Section 18A of the Criminal Procedure (Scotland) Act 1995. The section relates to person where criminal proceedings in respect of a relevant sexual offence or a relevant violent offence were instituted but those proceedings concluded otherwise than with a conviction or absolute discharge.

Page 21, paragraph 57 – You might wish to add to the final sentence so that it reads, “The Chief Constable of Police Scotland and the SPA Board are the relevant listed authorities and should ensure there are processes and procedures to ensure the way biometric data is acquired, used, retained, and destroyed complies with their Equality Act duties.” Otherwise the paragraph does not make clear how the Equality Act relates to biometric data.

Page 25, Guiding Principles, 1 – Lawful Authority and Legal Basis – It might be clearer for the reader if the sub-heading ‘Without consent’ was inserted before the first two paragraphs, and another ‘With consent’ inserted before the second two paragraphs.

In the third paragraph, which relates to victims and witnesses, it should be made clear that they are afforded at least the same protections as other data subjects, ie the data is obtained with their express written consent (Section 56, Criminal Justice (Scotland) Act 2003).

Page 26, Guiding Principles, 5 – Ethical Behaviour – You might wish to reconsider the wording of the phrase ‘beyond the minimum requirements of the law’ to ensure the intended meaning is clear. The description ‘disempowered communities’ might also need some explanation.

Page 32, Guiding Principles, 12 – Retention authorised by law – First bullet point under sub-heading ‘Adults’. The correct description of the stated case is ‘Gaughran-v-United Kingdom. It might be useful to include a footnote and hyperlink to the case. Also suggest re-wording: “regarding the need to consider the proportionality of interference with Article 8 rights where there is indefinite retention of biometric data without periodic review.’

Second bullet point under sub-heading ‘Adults’. Consider adding to final sentence to read: ‘Therefore, photographic data from convicted persons can be retained indefinitely subject to the considerations mentioned above regarding the Gaughran-v-United Kingdom ruling.’

Third bullet point under sub-heading ‘Adults’. Consider insertion of word ‘certain’ before ‘fixed penalty notice’.

Fifth bullet point under sub-heading ‘Adults’. Consider removing ‘immediately’ and replacing with ‘as soon as possible’ in line with wording of legislation.

Page 41, Appendix A, Quality Indicators.

Outcomes – A1(a) – consider inserting after ‘in place’, the phrase ‘and are regularly reviewed’.

Leadership and Governance – B2(a) – consider adding ‘having considered relevant data and emerging trends’.

People – D6(b) – consider adding, ‘and refresher training’.



I trust these suggestions will be useful when you are considering the final draft of the Code of Practice.

Thank you for the opportunity to provide feedback.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G. Imery', written in a cursive style.

Gill Imery
HM Chief Inspector of Constabulary

